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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARON PICTURES LTD., Plaintiff and Appellant, v. SAM EIGEN et al., Defendants and Respondents.	B280738 (Los Angeles County Super. Ct. No. SC120432)

APPEAL from a judgment of the Superior Court of Los Angeles County, H. Chester Horn, Jr., Judge. Affirmed.

The Law Office of Suzanne Raina Natbony, Suzanne R. Natbony; Freeman Freeman & Smiley and Jeffrey M. Jensen for Plaintiff and Appellant.

Charnley Rian, Richard L. Charnley and Annie Rian for Defendants and Respondents.

INTRODUCTION

This is a dispute between the owner of a film and the agent hired to license and distribute the film. Plaintiff and appellant Maron Pictures Ltd. entered into a Sales Agency Agreement (SAA) with defendant and respondent Mainsail, LLC to license and distribute Maron Pictures's film Strength and Honour. Disputes arose between the parties within a few months of executing the SAA, but Maron Pictures did not file this action until four years later. Maron Pictures's action named respondents Mainsail, Mainsail's Director of Distribution Sam Eigen, and Shoreline Entertainment, Inc., as defendants.[1] The trial court adjudicated the action in three separate phases. First, it granted summary adjudication in favor of defendants on most of Maron Pictures's claims on the ground the claims were barred by a one-year limitations period set out in the SAA. Then, the court held a bench trial on two surviving equitable claims, and found Maron Pictures had neither established a basis for declaratory relief based on the contractual accounting provisions nor shown it was entitled to an equitable accounting. Finally, the court granted defendants' motion for summary judgment on the remaining claims.

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[1] The SAA is, on its face, between Mainsail and Maron Pictures. Maron Pictures alleged Eigen was the acting agent and principal owner of both Mainsail and Shoreline and that both corporations were the alter egos of Eigen. The three were often referred to collectively in the trial court and sometimes in the pleadings in this court. Generally, we also refer to the three collectively; by doing so, we do not intend to imply the existence of any relationships between or among them.

Maron Pictures claims the trial court erred in all three phases of the adjudication of its claims. Maron Pictures argues summary adjudication was improper because the SAA's contractual limitations period was in practice only a notice provision, and even if there were a limitations period, its claims involved periodic obligations and so remained viable under the continuous accrual doctrine. Maron Pictures also contends defendants should have been equitably estopped from asserting the limitations provision.

As to the court trial, Maron Pictures contends the court erred in finding defendants have not received any revenue from the film. Maron Pictures also contends the court's final summary judgment order must be reversed because the court abused its discretion when it permitted Maron Pictures's counsel to withdraw and then declined to continue the hearing on the summary judgment motion so that Maron Pictures could retain new counsel. We affirm the trial court's judgment.

BACKGROUND

Mark Mahon is the president and managing member of Maron Pictures Ltd., doing business as Maron Pictures, LLC, a single member LLC. He wrote, produced, directed, and financed the film Strength and Honour. Mahon was not an established filmmaker when he made Strength and Honour and he has claimed throughout this action that he used his life savings to make it. The film has been shown at film festivals worldwide and has won awards.

In April 2009, Maron Pictures entered into the SAA with Mainsail. The SSA gave Mainsail the exclusive right to distribute the film worldwide. Maron Pictures was required to "deliver" film and video elements to Mainsail within two weeks of

the date of the SSA. Mainsail in turn would deliver the film and its elements to entities who would broadcast the film, show it in theaters, or sell it in DVD format.

After signing the SSA, defendants repeatedly notified Maron Pictures that its delivery was incomplete. Even after defendants entered into several licensing agreements for the film, defendants continued to view Maron Pictures's delivery as incomplete. Maron Pictures took the position delivery was complete by September 17, 2009, with the exception of an errors and omissions insurance policy it was obligated to purchase under the agreement. Maron Pictures contends defendants then agreed to purchase the insurance and subtract the cost from Maron Pictures's revenues from the film's distribution.

In January 2010, defendants released the film in some locations. Maron Pictures believed the trailers, covers, and "one sheets" used by defendants violated the terms of the SAA. Primarily, Maron Pictures believed the unauthorized items were a breach of its agreement with one of the film's leading actors. On January 22, 2010, after defendants failed to respond to Maron Pictures's requests to change the trailers, covers, and one sheets, Maron Pictures sent a "cease and desist" letter to defendants, instructing them to stop "distributing" the film.

On October 6, 2010, Maron Pictures filed a demand for arbitration, as required by the SAA. Defendants responded by suggesting mediation. By December 2010, the parties agreed on a mediator, but defendants never agreed to a date for mediation. In April 2011, Maron Pictures elected not to proceed with arbitration rather than pay the necessary fees to the arbitrator to get the process started. On April 21, 2011, the arbitrator closed its arbitration file.

The record does not contain information about the parties' activities between April 2011 and March 2012. Almost a year passed since the arbitration was formally abandoned. On March 20, 2012, Maron Pictures wrote to Mainsail formally demanding an accounting. On April 1, 2012, Mainsail replied it "no longer [had] a business arrangement" with Maron Pictures and had "nothing further to add." On June 5, 2012, Maron Pictures replied that it would now "address all our issues directly through the litigation route."

The record does not contain any information about Maron Pictures's activities between June 5, 2012 and March 2013. On March 22, 2013, Maron Pictures filed this lawsuit. The original complaint asserted causes of action for declaratory relief, fraud, rescission, breach of contract, negligent misrepresentation, breach of fiduciary duty and for an accounting.[2] After the trial court granted summary adjudication, Maron Pictures filed a first

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[2] In Maron Pictures's attempts to show error on appeal, Maron Pictures refers repeatedly to various provisions of Federal Copyright Law (17 U.S.C. §§ 106, 106A, 122, 501, 502, 506). Maron Pictures did not mention these provisions in its complaint, in opposition to summary judgment, or in its trial brief. Maron Pictures did proffer a certificate of copyright registration as an exhibit at the trial, but it was not admitted into evidence. Maron Pictures did not provide a reporter's transcript on appeal and there is nothing in the record which shows the purpose of that exhibit. Although Maron Pictures claims in its opening brief that its trial counsel "instructed the court" that Maron Pictures was entitled to the full protection of Federal Copyright Law, in the absence of a reporter's transcript there is nothing in the record to support this claim. Accordingly, Maron Pictures may not raise Federal Copyright Law for the first time on appeal.

amended complaint which asserted causes of action for declaratory relief, breach of contract, accounting, and conversion.

DISCUSSION

I. Order Granting Summary Adjudication on the Initial Complaint

Defendants moved for summary judgment on the ground Maron Pictures's claims were barred by the contractually agreed-upon limitations period of one year set out in the SSA. Defendants submitted as undisputed facts that the SAA "contains a one-year limitations period for bringing claims arising from the Agreement" and Maron Pictures was aware of the claims in this lawsuit no later than October 6, 2010, when it submitted its demand for arbitration. Maron Pictures agreed these facts were undisputed. Defendants also stated as an undisputed fact that the SAA's one-year limitations period expired on October 6, 2011, more than one year before the action was filed on March 22, 2013. Maron Pictures disputed this fact. It contended: (1) the limitations provision in the contract was satisfied by Maron Pictures's timely filing of a demand for arbitration in October 2010; (2) defendants were estopped from asserting the limitations provision because, by suggesting mediation, they induced Maron Pictures to end the arbitration proceedings and postpone litigation; and (3) the continuous accrual doctrine resulted in all claims being timely.

The trial court found (1) the limitations provision of the SAA barred claims arising more than one year before the complaint was filed; (2) defendants were not estopped from asserting the limitations provision by their offers to mediate the dispute; and (3) the continuous accrual doctrine permitted Maron Pictures to bring a claim based only on defendants' failure to

provide an accounting within one year prior to the filing of the action. We consider each ruling in turn below.

A. Standard of Review for Summary Judgment

A party may move for summary judgment in an action or proceeding if it is contended the action has no merit or there is no defense to the action or proceeding, or may move for summary adjudication as to one or more causes of action within an action. (Code Civ. Proc., § 437c, subds. (a)(1) & (f)(1).) The motion must be accompanied by a separate statement of facts and " '*all* material facts must be set forth in the separate statement. "This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*." ' " (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30–31.)

" 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] " 'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.)

" '[I]t is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.' " (*Claudio v.*

Regents of the University of California (2005) 134 Cal.App.4th 224, 230.)

B. Scope of the Contractual Limitations Provision

In support of their contention that the one-year period expired on October 6, 2011, defendants relied on the SAA and the arbitration documents. Defendants contended the filing of the arbitration demand on October 6, 2010, showed Maron Pictures was aware of its claims on that date, thereby starting the one-year limitations period. Maron Pictures contended the SAA required only that an "action" be commenced within one year of knowledge and that the filing of the arbitration demand "satisfied, rather than commenced, the one-year limitations period" making timely in any forum all further actions based on the claims. Although Maron Pictures cited documents and declarations as evidence the expiration date was disputed, none of those items contained any extrinsic evidence about the meaning of the limitations period, or Maron Pictures's intent when it agreed to the one-year limitations period set out in the SAA.[3] Instead, Maron Pictures's argument was based on the language of the provision itself.

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[3] In its separate statement of facts, Maron Pictures pointed to the following evidence to dispute the expiration date of October 6, 2011: Wander declaration (¶¶4, 11–14), Mahon declaration (¶¶7-11), exhibit 3 (pp. 21, 27), exhibit 9 (p. 88), and for some causes of action exhibit 2 (p. 7).

Paragraph 17.3 of the SSA provides in full:

> "Licensor shall not be entitled to bring any action, suit or proceeding of any nature against Sales Agent or its licensees, whether at law or in equity or otherwise, based upon or arising from in whole or in part any claim that Sales Agent or its licensees has in any way violated this Agreement, unless the action is brought within one (1) year from the date on which Licensor knew or should have known, in the exercise of reasonable diligence, of the facts giving rise to this claim."

Maron Pictures contended the language to "bring an action, suit or proceeding" within one year was satisfied by the mere "filing [of] a demand for arbitration" within that time frame. Maron Pictures claimed defendants, who drafted the SAA, "chose to use the broad language 'bring an action, suit or proceeding' when [they] could have easily specified additional requirements." On appeal, Maron Pictures clarified its "additional requirements" claim, arguing "the contract does not give further instructions on what must occur [after filing a notice of arbitration], or discuss the effect of withdrawal of an arbitration demand, or in any way limit future rights to file." Maron Pictures contended it complied with the spirit of the contract because its demand "notified Defendants, in a timely manner, of [Maron Pictures's] complaints and requested a speedy, cost-effective solution as required by the contract."

Maron Pictures also claimed that even if defendants' interpretation of the limitations provision were deemed reasonable, Maron Pictures's interpretation is "the most reasonable under the circumstances" and so must be accepted under Paragraph 19.4 of the SAA which requires any ambiguity

in the SAA to "be resolved by applying the most reasonable interpretation under the circumstances, giving full consideration to the intentions of the parties at the date the Agreement was signed."

The court's statement of decision on this issue reads: "[Maron Pictures] argues that the timeliness of the 10/6/10 arbitration claim can somehow be attributed [to] this civil action." "There is simply no basis in ¶17.3 to find that the filing of the arbitration claim on 10/6/10 somehow renders this action timely. There is nothing in the language of ¶17.3 limiting its application to the 'first' action suit or proceeding filed by [Maron Pictures], or to arbitration claims. ¶17.3 applies to 'any action, suit or proceeding of any nature.' [Maron Pictures] fails to provide any logical explanation for [its] claim that the arbitration claim somehow renders this action timely."

We review the trial court's decision de novo, and conclude the SAA does not provide that the mere filing of a demand for arbitration, later withdrawn, renders all subsequent actions timely.

"The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. [Citation.] In engaging in this function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. (Civ. Code, § 1636.) Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. (Civ. Code, § 1639 ['[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. . .']; Civ. Code, § 1638 [the 'language of a contract is to govern its

interpretation. . .'].)" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125–1126.) The words of the contract are to be understood "in their ordinary and popular sense" unless "used by the parties in a technical sense, or unless a special meaning is given to them by usage." (Civ. Code, § 1644.) The "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 752.)

Paragraph 17.3 of the SAA provides at its core: "Licensor shall not be entitled to bring any action, suit, or proceeding of any nature . . . based upon . . . any claim that Sales Agent . . . violated this Agreement, unless the action is brought within one (1) year from the date on which Licensor knew . . . of the facts giving rise to the claim." Maron Pictures, of course, is the licensor, and Mainsail the sales agent.

Maron Pictures contends the phrase "bring an action" in this context must be understood in its ordinary and popular sense, which Maron Pictures claims is "to commence or start a proceeding" and nothing more. In Maron Pictures's view, the meaning of the phrase shows its purpose is to require notice of a party's complaints and request for a speedy solution. Once this initial notice is given, Maron Pictures contends, all subsequent actions are timely.

First, the word "action" is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a

public offense." (Code Civ. Proc., § 22; *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, *supra*, 3 Cal.5th at p. 752.) By its definition, "action" cannot be equated to an arbitration that does not occur in a "court of justice." Moreover, "action" is also generally considered synonymous with "suit." (*Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294, 1298.)

Second, the word "proceeding" is not defined in the Code of Civil Procedure. " 'Proceeding' has different meanings in different contexts. Narrowly, it means an action or remedy before a court. [Citations.] [¶] Broadly, it means 'All the steps or measures adopted in the prosecution or defense of an action.' " (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1105.) "The word 'proceeding' or 'proceedings' in its general sense refers to the form and manner of conducting judicial business before a court or judicial officer. [Citations.] It may also refer to a mere procedural step that is part of the larger action or special proceeding. [Citation.]" (*Lister v. Superior Court* (1979) 98 Cal.App.3d 64, 70.)

Building on the narrow definition set out above, we note that arbitrations are generally not judicial business conducted before a court or judicial officer. Indeed, contractual arbitration is in no sense a "trial of a cause before a judicial tribunal. . . ." (*Snyder v. Superior Court* (1937) 24 Cal.App.2d 263, 267; see also *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1795.) And, paragraph 23 of the SSA under scrutiny here

requires that arbitration be conducted not by a court or judicial officer, but "under the auspices of the IFTA."[4]

Notwithstanding our holding under the narrow definition, under the broad definitions set out in *Zellerino* and *Lister,* can we find that a demand for arbitration under the SSA is a proceeding, to wit, a "step[]or measure[] adopted in the prosecution or defense of an action," or a "mere procedural step that is part of the larger action or special proceeding"? We hold the answer is "no." The arbitration called for in paragraph 23 of the SSA is binding ("The intent of this Agreement is that the parties shall be able to resolve any disputes expeditiously through binding arbitration without risking becoming liable for the other party's costs, legal fees, and expenses in connection with the arbitration."). The intent of binding arbitration is to preclude, if possible, litigation of an action before a judicial officer. It is not part of a "larger action" nor is it adopted in the prosecution or defense of an action. It is separate and apart, as it should be, from any underlying or future civil action. As separate and apart, it cannot be a "proceeding" under the broader definition. To

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[4] IFTA stands for Independent Film & Television Alliance which administers arbitration proceedings in the entertainment industry. Its arbitrators, who are lawyers, claim experience in independent film and television finance, production, and distribution. (See Hoffman & Gendron, Judicial Review of Arbitration Awards After *Cable Connection*: Towards a Due Process Model, UCLA Entertainment Law Review, 17 UCLA Ent. L.Rev. 1, 10.) We note that paragraph 23 requires binding arbitration. The record in this appeal suggests that the parties waived that provision of the SSA and proceeded to litigate the action filed in the superior court.

effectuate the intent of the SSA, we read "proceeding" as synonymous with "action" and "suit."

Further, even if the arbitration demand satisfied the one-year limitations period, it did not completely erase the provision. The limitations period of the SSA leads us to conclude that the parties did not believe that the demand for arbitration would leave an open-ended limitations period. In the context of satisfying a limitations period, the phrase "bring an action" means not merely to "commence" an action within a defined period of time, but also to maintain that action. Thus, if an action is timely commenced, it remains timely as long as the action is pending. If, however, that action is dismissed, any new action based on the same claims is subject to the statute of limitations that applied to the first action. (See, e.g., *Thomas v. Gilliland* (2002) 95 Cal.App.4th 427.) Maron Pictures allowed its demand for arbitration to lapse as of April 21, 2011. It did not renew its demand for arbitration or file a civil action until March 22, 2013, about two years later. Allowing the arbitration demand to lapse brought the parties back to their original positions under paragraph 17.3. The claims are barred.

Finally, we must also consider the expressed intent of the parties concerning dispute resolution, as set forth in paragraph 23: "The Intent of this Agreement is that the parties shall be able to resolve any disputes expeditiously through binding arbitration . . . ." Maron Pictures's interpretation of the limitations provision would permit the licensor to drag out resolution of disputes indefinitely, by filing a notice of arbitration and dismissing, then waiting as long as it wanted to bring another action. This is the exact opposite of the expeditious resolution of disputes the parties intended.

The provisions of the SAA as a whole confirm paragraph 17.3 required Maron Pictures to bring and maintain a civil action within one year of knowledge of the violation on which the action is based.

C. Estoppel

Maron Pictures also disputed defendants' October 6, 2011 limitations date by stating as a fact that Maron Pictures "reasonably relied upon Defendants' statements insincerely representing an interest in participating in alternative dispute resolution in a meaningful way. Due to [Maron Pictures's] reliance, [Maron Pictures] delayed filing suit and thus suffered injury." Maron Pictures cited the declarations of its President Mark Mahon and its counsel Perry Wander, and written correspondence between the two parties as evidence of this reliance.

The relevant communications between Maron Pictures and defendants on the topic of mediation are brief. In October 2010, counsel for Maron Pictures proposed a pre-arbitration settlement conference. Eigen responded by proposing "non-binding mediation." In December 2010, Maron Pictures agreed to use the mediator suggested by defendants. The parties agreed to a date of February 2 for mediation. On January 11, 2011, however, defendants' counsel indicated he could not participate in mediation until mid-April. Maron Pictures's counsel replied that mid-April 2011 was too far out and stated, "if we can't reschedule this mediation sooner, I suspect my marching orders will be to file suit immediately. This is not what the parties had agreed to." Maron Pictures's counsel proposed February 28, 2011, for the mediation date. On January 24, 2011, defendants' counsel replied they could not set a date "until we have more information

at our disposal. [¶] As I mentioned, we will be in better shape next week." There is no further correspondence in the record between the parties discussing a date for mediation.[5] Maron Pictures did not pay the required arbitration fees, and the arbitration file was closed on April 21, 2011.

Mark Mahon stated in his declaration that "Eigen falsely represented an interest in meaningfully participating in a pre-arbitration settlement conference and sandbagged us for two years with misleading emails and phone conversations." Mahon provided no details of any communications from Eigen on this topic. Wander, counsel for Maron Pictures, stated in his declaration that in 2012 he "realized Defendants had never been seriously interested in meaningfully participating in any settlement conference or alternative dispute resolution and [Maron Pictures] had been sandbagged." Wander stated he "reasonably relied on Defendant Eigen's statements alleging an

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[5] On appeal, Maron Pictures contends, without citation to the record, that defendants' attorneys wrote to Maron Pictures's attorney on some unspecified date stating Eigen would be unavailable to participate in mediation until after May 27, 2011. Assuming this claim is supported by the record, it does not change our analysis. Maron Pictures does not claim that it received any mediation-related correspondence after that date.

It is not our task to search the record for these documents. We note that these communications were not identified as evidence in Maron Pictures's separate statement of facts or attached as exhibits to the declarations filed in support of Maron Pictures's opposition to summary adjudication. Thus, even if we could locate them in the record, we could not consider them. (See *North Coast Business Park v. Nielsen Construction Co.*, *supra*, 17 Cal.App.4th at pp. 30–31.)

interest in participating in a pre-arbitration settlement conference. My reliance was reasonable as Defendant Eigen and I, and Defendant's counsel and I, had a good relationship prior to my realization that they had sandbagged both my client and I." Wander also declared that his "reliance on Defendant's misleading communications was the reason I delayed filing suit." Wander did not provide details of any communications from defendants after January 2011.

The trial court found: [Maron Pictures] fails to present any evidence that Defendants acted in a way to misled [Maron Pictures] into believing that this action would be timely or would not be barred by the limitations period under ¶17.3 of the Distribution Agreement. [Maron Pictures] testifies that it did not aggressively pursue the 10/6/10 arbitration agreement because Defendants expressed a willingness to mediate after the arbitration claim was filed. See Decl. of P. Wander, ¶¶ 13-19. Between January 6 and 10, 2011, Defendants indicated intent to proceed with ADR. *Id*. Thereafter, Defendants failed to cooperate in setting a time for ADR. [Maron Pictures's] last attempt to schedule ADR with Defendants was in April 2011. *Id*." Thus, the trial court concluded, "[Maron Pictures] was fully aware of Defendants' non-responsiveness to ADR for nearly four months. Despite this knowledge, [Maron Pictures]did not pay the arbitration fees or did not ask for an extension. [Maron Pictures] simply let the file close on the arbitration. . . . [¶] . . . [T]he arbitration was closed on 4/21/11. [Maron Pictures] had nearly six months for [it] to either timely file a new arbitration claim or the instant civil action. Instead, [Maron Pictures] waited until 3/22/13, almost two years later, to file this civil action. Again, [Maron Pictures] simply fails to provide any logical connection

between its decision to wait until 3/22/13 to file this action and Defendants' unresponsiveness to mediation attempts between January and April 2011."

A defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384–385 (*Lantzy*).) The defendant need not intend to deceive the plaintiff to give rise to an equitable estoppel. (*Id.* at p. 384.)

Equitable estoppel applies " ' "only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period." ' [Citation.]" (*Lantzy*, *supra*, 31 Cal.4th at p. 383.) Thus, equitable estoppel does not apply if the defendant's representations are shown to be false before the limitations period expires. (See *id.* at p. 384.)

Where the facts are undisputed, the existence of an equitable estoppel is a question of law. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319 [application of equitable estoppel is ordinarily a question of fact; however, it is properly resolved as a matter of law when only "one inference may reasonably be drawn" from the material facts].)

After independently reviewing the record, we conclude reliance by Maron Pictures on defendants' conduct after May 2011 was not reasonable as a matter of law. Here, as the trial court found, it was undisputed that, after the end of January 2011, defendants did not cooperate in attempts to schedule mediation. Maron Pictures's counsel twice indicated that if mediation could not be scheduled in a timely manner, Maron Pictures would file a lawsuit. As noted above, in January 2011, Maron Pictures's counsel told defendants' counsel if mediation could not be rescheduled sooner than mid-April, "I suspect my marching orders will be to file suit immediately. This is not what the parties had agreed to." Defendants' counsel did not respond. On April 21, 2011, the arbitration file closed.

On April 26, 2011, Maron Pictures's counsel copied defendants' counsel on an email to the proposed mediator which stated: "My client is still interested in mediation. His partners have finally raised my retainer and I expect I will be filing a lawsuit against all parties on my return from Paris after May 9, 2011." Defendants did not respond.

Defendants' repeated conduct of postponing the mediation, followed by a lack of response to Maron Pictures's communications clearly showed defendants' representations about participating in mediation were not sincere, and defendants had no further intention to participate in mediation or another form of alternate dispute resolution. Defendants' insincerity was thus apparent by the end of January 2011, well

before the contractual limitations period expired. Equitable estoppel does not apply as a matter of law.[6]

D. Continuous Accrual

It was undisputed the SAA required defendants to provide a periodic accounting when certain conditions were met. It is also undisputed defendants had never provided Maron Pictures with such an accounting. Maron Pictures argued each period which passed without an accounting constituted a new breach of the SAA, and so restarted the limitations period on all of Maron Pictures's claims.

The trial court agreed with Maron Pictures in part. The court found: "[Maron Pictures] raises a triable issue of material fact as to whether ¶17.3 bars the claims based [on] Defendants' failure to provide biannual accountings." The court explained this action "was filed on 3/22/13 and any claims based on the failure to provide accounting from 3/22/12 onward are not time barred by the 1-year limitations period under ¶17.3."

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[6] The application of equitable estoppel also requires a plaintiff to proceed diligently once the truth is revealed. (*Lantzy*, *supra*, 31 Cal.4th at p. 384.) Maron Pictures offers no explanation for its decision to wait almost two years after its last failed attempt to schedule mediation before filing this action. As a matter of law, inactivity is not diligence.

Maron Pictures argues on appeal that it did not become aware "of all of the relevant facts until December 2014" when it received "incomplete and inaccurate accounting statements." This issue was relevant to the accounting claim and was considered during the court trial. For purposes of the summary judgment motion, Maron Pictures did not dispute defendants' statement of fact that Maron Pictures was aware of its claims on October 6, 2010.

Maron Pictures claims the court's ruling is too narrow, and the continuous accrual doctrine should have been applied to all of its claims dating back to the beginning of the SAA. Maron Pictures has misunderstood the continuous accrual doctrine, confusing it with the limitations period under the continuing violation doctrine.[7] Under the doctrine of continuous accrual, "a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period." (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192 (*Aryeh*).) In contrast, "[t]he continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them." (*Ibid.*) Thus, while "the continuing violation doctrine . . . renders an entire course of

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[7] Maron Pictures uses the phrase "continuous accrual" on appeal, but its memorandum of points and authorities in opposition to summary judgment does not use the phrase "continuous accrual" or "continuing violation," and does not contain legal citations to either doctrine. Maron Pictures argued that "each passing period wherein Defendants did not provide an accounting constituted a new material breach of the contract." That is a description of the continuous accrual doctrine; that doctrine applies to "separate, recurring invasions of the same right." (*Aryeh*, *supra*, 55 Cal.4th at p. 1198.) In contrast, the continuing violation doctrine applies to "injuries [which] are the product of a series of small harms, any one of which may not be actionable on its own" or "where 'some or all of the component acts might not be individually actionable' and the plaintiff 'may not yet recognize' the acts 'as part of a pattern.' " (*Id.* at pp. 1197–1198.)

conduct actionable, the theory of continuous accrual supports recovery only for damages arising from those breaches falling within the limitations period." (*Id.* at p. 1199.)

After independently reviewing the record, we reach the same conclusion as the trial court. The accounting obligation is a recurring one, and each breach of that obligation has its own individual limitations period. Breaches of the periodic accounting obligation which occurred more than a year before this action was filed are time-barred; those occurring on or after that date are not.

II. Court Trial

After granting summary adjudication as to most of Maron Pictures's claims, the trial court ordered: "The First Cause of Action for Declaratory Relief, as it pertains to the remaining claim for violation of the SAA, and the Seventh Cause of Action for Accounting are equitable claims and are bifurcated from the remaining issues. [¶] Accordingly, this action will be tried in the following manner: [¶] 1. The Court will try the equitable claims on June 27, 2016. [¶] 2. The remaining issues, if there are any after the Court's determination of the equitable claims, will be tried before a jury on a later date."[8]

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[8] On June 27, 2016, the court trial began, in a different department than the one where defendants' motion for summary judgment was heard. The minute order states: "Court and counsel confer regarding clarification of the trial issues as to Phase I of the trial that this Court will hear this date." Maron Pictures has elected to proceed on appeal without a reporter's transcript and so there are no details of this conference in the record. The record shows the court did try the two equitable claims, and found there were no issues remaining after that trial.

Following a four-day trial, the court issued a proposed statement of decision, which states in pertinent part: Maron Pictures "seeks a declaration of [its] right to terminate the [SAA] for an alleged breach of the defendants' obligation to account to [Maron Pictures] for revenues earned from the distribution and sale of the film. [Maron Pictures] also seeks an accounting for all revenues earned under the SAA, including an accounting of monies allegedly owed to [it] by the defendants as a result of various distribution contracts Mainsail entered into pursuant to the SAA." We consider each claim separately.

A. The Record on Appeal Limits the Scope of Review

"[I]t is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is the appellant's burden on appeal to produce a record " 'which overcomes the presumption of validity favoring [the] judgment.' " (*Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 595.)

Maron Pictures has elected to proceed on appeal without a reporter's transcript. The presumption of correctness " 'has special significance when . . . the appeal is based upon the clerk's transcript.' [Citation.] 'It is elementary and fundamental that on a clerk's transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings . . . .' " (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521-522.) Our review is limited to

determining whether any error "appears on the face of the record." (*Id.* at p. 521; see Cal. Rules of Court, rule 8.163.)[9]

Unless an error appears on the face of the record, an appellant's " '[f]ailure to provide an adequate record on an issue requires that the issue be resolved against [appellant].' " (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; see *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259 ["The absence of a record concerning what actually occurred at the hearing precludes a determination that the court abused its discretion."].)

B. Declaratory Relief - Contractual Accounting Obligation

Maron Pictures's declaratory relief claim was based on defendants' admitted failure to provide Maron Pictures with periodic accounting statements showing revenue generated by the film; Maron Pictures alleged the SAA required such statements. Maron Pictures sought a declaration that Mainsail's breach of its obligation entitled Maron Pictures to terminate or rescind the SAA.

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[9] California Rules of Court, rule 8.163 provides: "The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record."

The trial court found "Paragraph 12.2 obligated Mainsail to provide Maron Pictures with 'statements of Gross Proceeds' only after delivery was complete." The court also found "Maron Pictures delivered some but not all of the items required by the delivery Schedule. It is simply not disputed Maron Pictures could not, and did not, make complete delivery as required by the Delivery Schedule. [Testimony of Mark Mahon and Sam Eigen.] However, Maron Pictures was able to deliver sufficient materials for Mainsail to begin licensing activities and, in fact, license the film in various countries resulting in revenues being earned."

The court also found Mainsail stopped all licensing activities "when it received a 'cease and desist' letter from Maron Pictures on January [22], 2010. [Exh. 254.] As of March 12, 2010, Mainsail had received $224,541 in Minimum Guarantees from its licensing activities, and had earned Gross Proceeds of $123,671. [Exh. 269-M00120.] The film was still being shown in some countries during the years 2014 through 2016. [Exh. 316.] However, Mainsail introduced evidence that it had received no funds related to the film during those years or since calendar year 2010. [Exhs. 205, 206, 207, 208, 209, and 210.]" The court added "it is undisputed that no accounting statements provided for by Paragraph 12.2 of the SAA were ever given to Maron Pictures, nor has Maron Pictures received any revenue from [M]ainsail as a result of the licensing revenue it did receive."

The court then ruled: "To establish a claim for declaratory relief, [Maron Pictures] needs to show that there is some uncertainty with respect to the parties' obligation under the SAA that requires the Court to resolve. Here, Maron Pictures makes no such claim. Instead, it asks the court to determine that Mainsail failed to provide required accountings, so that Maron Pictures may terminate the SAA under the provisions of Paragraph 18.1. However, the Court may not rewrite the parties' agreement. [*Culbertson v. Cizek* (1964) 225 Cal.App.2d 451.] Maron Pictures['s] contention that Mainsail violated the SAA hinges on its claim that it, in fact, made complete Delivery within the meaning of Paragraph 12.2. Maron Pictures failed to prove that critical fact. The Court finds that Maron Pictures has failed to establish by a [preponderance] of the evidence that Mainsail violated the terms of the SAA. Accordingly, Maron Pictures had not established a basis for the declaration it seeks."

Maron Pictures contends substantial evidence does not support the trial court's finding it never completed delivery. Maron Pictures elected to proceed without a reporter's transcript of the trial and so we conclusively presume there is substantial evidence to support the trial court's findings. This presumption is particularly appropriate here, where the trial court expressly relied on the trial testimony of Sam Eigen and Mark Mahon, testimony that is not part of the record on appeal due to the absence of a reporter's transcript.

Nevertheless, the result would be the same if we set aside the presumption and looked at the trial exhibits in the record.[10]

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[10] Although the parties designated the trial exhibits as part of the record on appeal, the clerk of the superior court was unable to include those exhibits. The parties filed motions to augment

Although there is disagreement and confusion on appeal about the exhibits offered and admitted at the court trial, a series of emails sent from various employees of defendants and from Eigen, repeatedly state Maron Pictures has not delivered items on the delivery schedule. In responsive emails, Maron Pictures disputes some of these claims, but not all. It is, for example, undisputed that Maron Pictures failed to provide errors and omissions insurance.

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pursuant to California Rules of Court, rule 8.841, which permits the parties to file a motion to augment under such circumstances. We grant defendants' motion to augment the record with documents they declare are the missing trial exhibits. Maron Pictures does not dispute the accuracy of defendants' compilation.

We grant Maron Pictures's request to augment the record with (1) a copy of the original complaint in this matter, attached to the Mahon declaration as exhibit 2 and (2) a copy of trial exhibit 329, attached to the Mahon Declaration as exhibit 10. We deny the remainder of Maron Pictures's motion to augment. trial exhibits 254, 327, 331, 333 and 338 have been judicially noticed in defendants' motion to augment. Mahon states that the documents attached to his declaration as exhibit 1 were "filed" as exhibit 200 at trial. The minute orders for trial do not show that any exhibit numbered 200 was introduced and marked for identification at trial. The remaining trial exhibits attached to the Mahon declaration appear to have been marked and introduced at trial, but not admitted into evidence. We note that defendants' exhibit 269 was admitted into evidence; Maron Pictures's duplicatively-marked exhibit 269 was not admitted into evidence. In the absence of a reporter's transcript, we are unable to review the trial court's rulings excluding Maron Pictures's exhibits, and so those exhibits have no relevance on appeal.

Maron Pictures presented to the contrary. In the absence of a reporter's transcript, there is nothing to show Maron Pictures raised the issue of substantial compliance in the trial court, and we treat the issue as forfeited.

Even if we considered Maron Pictures's claim of substantial compliance, Maron Pictures would not prevail. While it is undisputed Maron Pictures delivered enough items to enable defendants to license the film and earn revenue from the licensing, it was not clear error on the face of the record for the court to find nondelivery.

The extent of Maron Pictures's compliance cannot be determined from the face of the record on appeal.[11] Defendants' ability to satisfy the requirements of *some* distributors in the absence of complete delivery by Maron Pictures does not show defendants were able to satisfy the requirements of all distributors, or even most distributors. To the contrary, it is clear defendants were not able to meet the requirements of key distributors. For example, in a November 28, 2009 email from Eigen to Maron Pictures, Eigen confirms "E1" is no longer planning to do a theatrical release due to Maron Pictures's late delivery of required elements.

Maron Pictures also contends the court's ruling is wrong because the law abhors a forfeiture. It is not entirely clear what Maron Pictures believes has been forfeited. The trial court's ruling resulted in Maron Pictures having no contractual right to receive periodic accounting statements from defendants. Maron

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[11] Paragraph 15.4.1 of the SAA gives the sales agent the right to furnish any undelivered items and to recover the costs from licensor. There is evidence that defendants did so, at least in part.

Pictures still has a contractual right to obtain financial information from defendants. Paragraph 12.1 of the SAA requires defendants to keep books and records using generally accepted accounting procedures; the duty is not contingent on Maron Pictures's completion of delivery. Paragraph 12.7 permits Maron Pictures to audit those books once a year; this right is not conditioned on delivery completion. Thus, the trial court ruling did not result in Maron Pictures having no access to financial information about its film's licensing, it merely shifted the cost and initiative from defendants to Maron Pictures.

To the extent Maron Pictures contends the court's ruling means it lost all rights to the film forever, Maron Pictures is mistaken. The trial court simply found that the specific breach of contract posited by Maron Pictures as a basis for terminating the SAA did not occur and therefore Maron Pictures had no right to terminate the SAA on that basis.

C. Equitable Accounting

Maron Pictures's second claim was for an equitable accounting. The court found Maron Pictures's claims were limited to revenues received by defendants after March 22, 2012. The court found Maron Pictures had failed to produce any evidence showing defendants received any licensing revenue related to Maron Pictures's film after March 2010. The court concluded Maron Pictures "has failed to establish that it is entitled to any accounting from the defendants."

In its reply brief, Maron Pictures contends the trial court erred in finding it was not entitled to an accounting because it failed to show the film generated any revenues.[12] Maron Pictures points out the SAA calls for accounting statements even when there is no revenue. The trial court made this finding as part of the equitable indemnity claim, not the breach of contract claim.

A plaintiff bringing a cause of action for an equitable accounting has the burden of showing "some balance is due the plaintiff that can only be ascertained by an accounting." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) Thus, the trial court did not err in placing the burden on Maron Pictures to show a balance was due. We conclusively presume there is substantial evidence to support the trial court's finding that Maron Pictures did not meet that burden.

The result would be the same, however, if we set aside the presumption and looked at the documentary evidence in the record. Here, it was undisputed Maron Pictures sent defendants a cease and desist letter in January 2010. An accounting statement shows that as of March 2010, gross proceeds had been earned under several of the distribution agreements which were entered into before the cease and desist letter; that statement also shows none of these proceeds were payable to Maron Pictures. Defendants produced evidence they had not received any funds related to Maron Pictures's film since 2010.

Maron Pictures points to evidence its film was shown in Europe during the years 2014 to 2016, and contends defendants

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[12] Although Courts of Appeal do not usually consider arguments made for the first time in an appellant's reply brief, Maron Pictures makes this argument in response to contentions in defendants' brief and so we consider it.

must have earned revenue from those showings. We must treat this as a claim that there is clear error on the face of the record. We do not see such error. Although Maron Pictures offered several exhibits which it contends list showings of its film since 2010 (exhibits 316 and 318-322), only one page of exhibit 316 was admitted into evidence. Exhibit 316, cited by the trial court, shows 13 showings on Turner Classic Movies (TCM) in Europe from 2014 to 2016. It is not clear from the record on appeal whether defendants had any agreement with TCM, the channel which showed Maron Pictures's film: none of the licensing agreements in the record refers to TCM or appears to cover Europe. There is no evidence in the record to support even an inference that defendants must have received revenue from those showings, and thus nothing to show clear error in the trial court's findings.[13]

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[13] Further, the distribution agreements in the record contain provisions for guaranteed minimum revenue which required payment no later than when the film was delivered to the distributors. Revenue received by a distributor from any particular showing of the film could have been retained by the distributor as an offset against the guaranteed minimum payment made to Mainsail in 2009 or 2010.

III. Motion for Summary Judgment on the First Amended Complaint

Maron Pictures contends the trial court should not have granted counsel's motion to withdraw from the case before Maron Pictures had time to find a new attorney and should not have denied Maron Pictures's informal request for a continuance of defendants' motion for summary judgment. Maron Pictures claims it was unable to find substitute counsel in time to oppose the motion for summary judgment, and the trial court's grant of the motion was therefore improper.

We review an order granting a withdrawal motion for an abuse of discretion. (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1133; *Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4.) We see no abuse of discretion in the court's ruling.

Wander, Maron Pictures's counsel, moved to be relieved, alleging there had been a complete breakdown of the attorney-client relationship. His declaration filed in support of the motion shows such a breakdown. Wander declared Mahon had "threatened" him after the court issued its proposed statement of decision on July 7, 2016, and also after Wander advised Mahon to settle. Wander also referred to a July 18, 2016 communication sent directly from Mahon to the trial court, which consisted of a letter, a proposed statement of decision and a copy of the Strength and Honour DVD. There was also a "fee dispute." Wander believed it was not in the interest of either the client or the attorney to continue such a relationship.

Maron Pictures contends the trial court should nonetheless have required Wander to continue his representation until Maron Pictures found another attorney, because a corporation may not represent itself. Maron Pictures is mistaken.

"The ban on corporate self-representation does not prevent a court from granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation. Such an order puts pressure on the corporation to obtain new counsel, or risk forfeiting important rights through nonrepresentation. (*Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504.)" (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284, fn. 5.)

Here, Wander mailed a copy of the motion to withdraw to Maron Pictures at the address in Ireland used on the July 18 letter and "confirmed the address with the Irish Companies Registration Office online." On September 7, 2016, Wander filed a substitution of attorney form that showed Maron Pictures representing itself. The document shows someone signed the document on behalf of Maron Pictures and consented to the substitution.

On September 14, 2016, the court denied Wander's motion to be relieved as counsel, on the ground the moving papers did not demonstrate proper service on the client, a foreign national. Wander was ordered to either show proper proof of service on the client or provide a substitution of counsel statement that identified new counsel for Maron Pictures. The court noted Maron Pictures could not represent itself.

On October 21, 2016, the trial court granted Wander's motion to be relieved. Mahon was present in court, and the court advised him it is unlawful for a business entity to make appearances without an attorney. Maron Pictures had more than

a month to obtain counsel before the October 21 hearing, but did not do so. We recognize Mahon, Maron Pictures's representative, lived in Ireland, but he would still have been able to search for lawyers in California. Thus, putting some pressure on Maron Pictures to find new counsel was appropriate.

After granting Wander's motion to withdraw, the court also stated defendants' motion for summary judgment would remain set for December 9, 2016. Maron Pictures claims the court should have granted his informal request for a continuance beyond December 9.

We review a trial court's denial of a request for a continuance of a motion for summary judgment for an abuse of discretion. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

Maron Pictures had another six weeks to obtain counsel before the December 9 hearing. Even assuming for the sake of argument that a new attorney could not have prepared an adequate opposition to the summary judgment motion in that time frame, a newly retained attorney could have formally requested a continuance of the summary judgment motion. By December 9, Maron Pictures had not obtained an attorney for even the limited purpose of making a formal request for a continuance.

Moreover, Maron Pictures has not shown it suffered prejudice from the denial of the continuance. Maron Pictures has not shown it had a viable basis for opposing the summary judgment motion. Maron Pictures argues it could have raised federal copyright claims in response to the motion. Raising a claim under Federal Copyright Law would, at a minimum, have required amending its complaint, and it is highly unlikely such an amendment would have been permitted at such a late date.

Maron Pictures also argues it could have presented evidence the film was still being commercially exploited around the globe. Maron Pictures had already lost on that issue at the court trial.

The trial court did not abuse its discretion in permitting Wander to withdraw as counsel or in denying Maron Pictures's informal request for a continuance. Maron Pictures did not obtain counsel in the more than two months between the filing of Wander motion to withdraw and the hearing on defendants' summary judgment motion, and has offered no explanation other than Mahon's residence in Ireland to explain this failure. The trial court did not err in granting defendants' unopposed motion for summary judgment.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.